U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: May 22, 1998

CASE NO.: **97 INA 327**

In the Matter of:

MC KINLEY AVENUE GUEST HOME,
Employer

on behalf of

NATIVIDAD V. TOLENTINO,
Alien

Appearance: S. J. Smith, Esq., San Jose, California.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of NATIVIDAD V. TOLENTINO ("Alien") by MC KINLEY AVENUE GUEST HOME ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On October 11, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Practical Nurse" in the Employer's "Residential Care Home." AF 38. The Employer described the job duties as follows:

> Clean house (17 bdrms, 4baths, kitchen, living room, dining, extra rooms (2)) assist 30 elerly residents with Alzheimer's Disease, dementia, heart attack and stroke victims, kidney patients, diabetic and incontinent; assist with bed bath, shower, sponge bath, tub bath;ambulating, exercising; shaving, hair care; assist with bed bath, shower, sponge bath, tub bath;ambulating, exercising; shaving, hair care; assist with medications; provide mouth care, bowel care, skin care, personal hygiene; vacuum, wash dishes, wash-iron-dry clothes and linens; handwash soft clothes; straighten rooms;change diapers every four hours; change urine bag every week. Clean the body of dirt, feces, urine.Prepare and serve meals and snacks, help those with walkers and canes. May wake up at night for resident's toilet needs. No alcohol permitted on premises.

AF 38 (Quoted verbatim without change or correction.) On November 18, 1994, the Employer requested that the following duties be added to item 13 of Form ETA 750 A:

> empty commodes, help those with walkers, case and wheel-chair bound residents with their needs; cleans sterilizes, sores, prepares and issues dressing packs, treatment trays and other supplies.

AF 40 (Quoted verbatim without change or correction. Also see AF 45.) The work hours were 7:00 AM to 4:00 PM in a forty hour week at $1,090 per month with no provision for overtime wages. The position was classified under DOT Occupational Code No. 355.674-014, as a Nurse Assistant.

The Employer required four years of high school, and three months of experience in the Job Offered or three months of experience in the Related Occupation of "caregiver." The Other Special Requirements were the following:

> If hired,

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

Must speak, read, and write English
Must have First Aid, CPR Certificate
Must have Health Screening Report issued by the State of California and Welfare Agency
Must be willing to be fingerprinted to be sent to the Dept. of Justice
Must have legal right to work if hired
Must know principles of good nutrition, good food preparation and storage and menu planning. Must know community services and resources.

AF 63. (Quoted verbatim without change or correction.) A native of the Philippines, the Alien has a baccalaureate degree as a Bachelor of Science majoring in Education, and a further degree as a Master of Science in Education. The Alien worked from 1951 to 1967 as an aide for elderly patients in a "hospital for sick patients" for thirty hours a week "while going to college." Some of her duties in that position were comparable to the job duties described in the Employer's Form ETA 750A, item 13, but materially less arduous.[3]
The one U. S. worker who responded to the recruitment advertisement was not hired in the Employer's recruitment effort to test the labor market under the Act. AF 37, 58.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") of December 8, 1995. AF 31-36.

1. The CO found that the following hiring criteria were restrictive in violation of 20 CFR § 656.21(b)(2)(i)(A) in that the Employer it required the duties that follow:

Cleaning house, must have First Aid and CPR certificate, Health Screening Report issued by State of California, Health and Welfare Agency, willingness to be fingerprinted, know principles of good nutrition, good food preparation, storage, and menu planning. Must know community services and resources.

AF 32. By way of rebuttal the Employer was directed to delete these restrictive requirements and state its willingness to readvertise the position under the Act and regulations or, in the alternative, to prove the business necessity of the requirements.

2. The NOF found that the hiring criteria were restrictive in that the Employer it required that the worker live on the premises in violation of 20 CFR § 656.21(b)(2)(iii). The NOF then directed that the Employer rebut this finding, amend its application, or prove its business necessity.

---

[3]The application does not disclose the nature or content of the Alien's work experience during the twenty-seven years from 1967 to April 9, 1994, the date she signed Form ETA 750. Employer admitted that the Alien has been living and working at the Employer's place of business for the past three years. Neither the Alien's application nor any other evidence of record suggests that the Alien could qualify for this position by meeting the Special Requirements in item 15 of Employer's Form ETA 750 A, however

3. The NOF found that the Employer had rejected U. S. workers for reasons that were neither lawful nor job-related in violation of 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv). Referring to U. S. worker Jodi Jeanne Jackson, the Employer was directed to rebut by specifying its lawful, job-related reasons for rejecting her and by giving the job title of the person who considered her application for this position.

4. In a separate finding, the CO said the Ms. Jackson is a Certified Nurses Aide with five years of experience, two and one-half years of which was spent home care. The job Employer was directed to provide valid, job related reasons for rejecting this U. S. worker, as the CO detemined under 20 CFR § 656.24(b)(2) (ii) that she was able and qualified for the Job Offered by her education, training, experience, or a combination thereof, concluding that she was able to perform in the normally accepted manner the duties involved in this occupation as it is customarily performed by other U. S. workers similarly employed. The Employer was directed to rebut by documenting lawful, job-related reasons for rejecting this U. S. worker.

5. Noting that the occupation and the tasks to be performed in this position require the worker to be licensed, the CO observed that the Alien did not appear to be legally eligible to perform the job duties because she did not possess the required license under 20 CFR § 656.20(c)(7). By way of rebuttal the CO directed (a) that the Employer identify the job duties that the Alien would perform temporarily until she obtained a license and became legally able to perform the full range of the duties stated in Form ETA 750 A and (b) that the Employer demonstrate that upon receiving immigrant status the Alien will be eligible to take the licensing examination or otherwise be eligible to obtain a license. In the alternative, the Employer was permitted to prove that the job duties do not require such licensure.

6. The CO found that Employer's application listed in item 13 of Form ETA 750 A job duties that did not appear in any single DOT position description. The CO found that the Employer's job requirements violated 20 CFR § 656.21(b)(2)(ii), citing **H. Stern Jewelers, Inc.**, 88 INA 421(May 23, 1990). The CO said that the Employer failed to document that it normally employed workers to perform the combination of the duties of a Nurse Assistant and a Houseworker, General thus described in its application for labor certification, that such a combination of duties was customarily performed in the area of intended employment, or that this combination of duties resulted from business necessity. The CO then described in detail the nature and content of the proof required, and included the applicable standard to be applied in weighing the evidence to be submitted.

7. Finally, noting that the Employer had provided First Aid and CPR certificates, the CO directed the Employer to state in its rebuttal whether or not it was willing to accommodate the U. S. workers applying for the job in the same manner.

Rebuttal. The Employer's rebuttal of September 30, 1996, argued that its combination of the duties of a Nurse Assistant and a Houseworker, General, were required by state regulations, excerpts of which it attached to the rebuttal. It further contended that its other restrictive requirements were mandated by a state regulation, which mention those restrictive requirements

as subjects for which the Employer was directed to provide on the job training to its personnel to prepare them for the performance of their job assignments. AF 24-27.

As to the live in provision, the Employer further stated in its rebuttal:

> This position requires a live-in position because Mckinley Avenue Guest Home takes care of residents who are frail elderly and afflicted with various illnesses. Their personal and sanitation needs occur irregularly, sometimes early morning or during the afternoon. It is essential that a caregiver is available and waiting during these hours to respond to the personal needs of the residents. This care and attention cannot be provided by a live-out worker.
>
> Most importantly, it is essential that a caregiver live on the premises to provide security for the residents, who cannot be left by themselves. ... The residents must be under the watchful and caring eyes of the caregiver in order to prevent accidents and other health hazards. A live-out worker cannot provide this attention to the residents.

AF 28. While the NOF found the live-in requirement to be an accommodation to the Alien and not necessarily a business necessity, Employer's rebuttal indicates that this was a job condition and not simply an "accommodation" for the worker.[4]

As to the rejection of the U. S. applicant, the Employer said in rebuttal that her lawful and job-related reason was that, even though Ms. Jackson is a certified nurse assistant, she did not possess the required minimum three months' experience in performing the job duties listed in the application. AF 29.

Final Determination. In the Final Determination of May 20, 1996, the CO denied certification, having concluded that the Employer's rebuttal was insufficient to rebut the NOF findings as to restrictive requirements. After quoting the state regulations the CO said the state provisions on which it relied did not support the Employer's incorporation of those rules as restrictive requirements for hiring a worker to fill this position.[5] Moreover, the CO said that the Employer had failed to submit convincing proof that "willingness to be fingerprinted" was not an unduly restrictive requirement under 20 CFR §§ 656.21(b)(2)(i)(A) and (B), and 656.21(b)(2)(ii).

Noting 20 CFR § 656.24(b)(2)(ii) and the qualifications by Ms. Jackson, the CO said that her experience, training and education met and exceeded the Employer's minimum requirements in Form ETA 750 A, the CO rejected as unpersuasive Employer's contention that

---

[4]In spite of the Employer's rebuttal, the only sign that there was a live-in requirement appeared at item 13 in Form ETA 750A, where the Employer said the worker, "May wake up at night for resident's toilet needs." On the other hand, even though the Employer apparently expected the worker to be on call both day and night, the application made no provision to pay overtime for services in excess of the forty hours stated in the Form ETA 750 A.

[5]t was observed that the text of the California State Regulation on which the Employer relied, observing that this provision did not make reference to Nurse Assistants.

she did not qualify for this position because her experience was gained while working under a different job title.

Finally, under 20 CFR § 656.21(b)(2)(ii) the CO rejected the Employer's combination of duties for a Nurse Assistant, explaining that, "The job duties and requirements should be consistent with those defined for the job in the Dictionary of Occupational Titles (DOT) and those normally required for the job in the United States. If the job ... involves a combination of duties, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and/or the combination job opportunity is based on a business necessity." After reexamining the Employer's description of the job duties, the CO continued,

> Granted, that a Nurse Assistant "dusts and cleans patient's room," but is highly improbably and unreasonable that any one individual could maintain the housekeeping duties of a household with 30 Patients [and] do all of the other necessary nurse assistant work.

For these reasons the CO concluded that the Employer had failed to demonstrate either that its combination of the duties of a Nurse Assistant and a Housekeeper, General, was normal or customary in this particular instance or that this combination resulted from a business necessity.

Appeal. On June 24, 1996, the Employer requested review by BALSA. AF 02. While the record did not contain a Motion for Reconsideration, the CO denied reconsideration, citing **Harry Tancredi**, 88 INA 441.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, its use of additional hiring standards and recruiting practices is limited by the Act and regulations when the employer applies such criteria and procedures to U. S. job seekers in the course of testing the labor market in support of an application for certification to hire an alien for the job at issue.

The purpose of 20 CFR § 656.21(b)(2) is to make the job opportunity available to qualified U. S. workers. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the Dictionary of Occupational Titles or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, § 656.21(b)(2) requires employer to establish the business necessity for the requirement. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U. S. workers who may apply for or qualify for the job opportunity. **Venture International Associates, Ltd.**, 87 INA 569 (Ja n. 13, 1989)(*en banc*).

In this context 20 CFR § 656.21(b)(2) must be applied with 20 CFR § 656.21(b)(1)(B)

(ii).[6] To prove that a combination of duties is based on business necessity the Employer was required to demonstrate that it needed to have a single worker perform the combined duties in the context of Employer's business, including a showing of such a level of impracticability as to make the employment of two workers unfeasible.[7] The Employer declined to amend its job duties in response to the NOF. In its Rebuttal, on the other hand, the Employer did not offer persuasive evidence (1) that it had employed persons for this combination of duties in the past, (2) that its workers customarily perform this combination of duties in the area of intended employment, or (3) that this combination of duties was based on its business necessity. **Robert Paige & Associates,** 91 INA 072, (Feb. 3, 1993); **Shaolin Buddhist Meditation Center**, 90 INA 395 (June 30, 1992). The Employer's arguments that its combination of duties was standard industry procedure or a business necessity were not supported by the evidence. Since the statement by the Employer is self-serving and is not corroborated, it is not persuasive in this case.[8] **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*).

The panel has examined Employer's brief and the evidence of record and agrees that the CO's finding was supported by the evidence of record and should be affirmed.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board

[6] In applying these regulations the Board has reasoned that an employer is not allowed to treat an alien more favorably than it would a U. S. worker. **ERF, Inc., d/b/a Bayside Motor Inn**, 89 INA 105 (Feb. 14, 1990).Also see **International School of Dog Grooming**, 93 INA 300 (Oct. 4, 1995).

[7] Assertions relating to either convenience or practicality are not enough to establish the business necessity of a combination of duties. **Robert L. Lippert Theatres,** 88 INA 433 (May 30, 1990) (*en banc*); **Jaclyn, Inc.**, 90 INA 210, 91 INA 342 (Oct. 31, 1991).

[8] It is elementary that the Employer's unsupported conclusions, *i.e.*, statements without explanation or factual support, were correctly found by the CO to be insufficient to demonstrate that the Employer's job requirements are normal for a position or are supported by business necessity. **Inter-World Immigration Service**, 88 INA 490 (Sept. 1, 1989), citing **Tri-P's Corp.**, 88 INA 686 (Feb. 17, 1989).

consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.